United States District Court

Eastern District of California

Anthony R. Turner,

Plaintiff, No. Civ. S 02-0543 MCE PAN P

vs. Findings and Recommendations

Cheryl Pliler, et al.,

Defendants.

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Plaintiff is a state prisoner without counsel prosecuting a civil rights action.

The action proceeds on the July 8, 2003, amended complaint against defendants Vernon and Dixon.

Plaintiff, who is psychotic, alleges defendants violated his right to constitutionally adequate medical care. Plaintiff alleges under penalty of perjury that defendant Vernon intentionally poured the wrong medication down plaintiff's throat while plaintiff's hands were cuffed behind his back, causing

plaintiff to collapse into a "seizure, blackout and a serious painful migraine, head injury, severe stomach[] and abdominal cramps, and sharp severe internal pains." Amended Complaint at 10. Vernon informed Dixon of the error, and Dixon failed to order appropriate emergency treatment. In an effort to conceal the error, Dixon dosed plaintiff with Benadryl, failed to order plaintiff's stomach pumped, and injected plaintiff with a "knockout" drug. Vernon and Dixon entered a "conspiracy" to hide the problem.

March 18, 2005, defendant Vernon moved for summary judgment. Plaintiff did not oppose.

In seeking summary judgment the moving party must establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the opposing party. Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986). A fact is "material" if it affects the right to recover under applicable substantive law. Id. The moving party must submit evidence that establishes issues upon which the movant bears the burden of proof; if the movant does not bear the burden of proof on an issue, the movant need only point to the absence of evidence to support the opponent's burden. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). To avoid summary judgment on an issue upon which the opponent bears the burden of proof, the opponent must present affirmative evidence sufficiently probative such that a

jury reasonably could decide the issue in favor of the opponent. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986). When the conduct alleged is implausible, stronger evidence than otherwise required must be presented to defeat summary judgment. Id. at 587.

In considering summary judgment, this court should view the evidence in the light most favorable to the nonmoving party. Jones v. Blanas, 393 F.3d 918 (9th Cir. 2004). Where the nonmoving party is pro se this court should "consider as evidence in his opposition to summary judgment all . . . contentions offered in motions and pleadings, where such contentions are based on personal knowledge and set forth facts that would be admissible in evidence . . . attested under penalty of perjury . . . as true and correct." Id.

"The unnecessary and wanton infliction of pain upon incarcerated individuals under color of law constitutes a violation of the Eighth Amendment . . ." McGuckin v. smith, 974 F.2d 1050, 1059 (9th Cir. 1991). A violation of the Eighth Amendment occurs when prison officials deliberately are indifferent to a prisoner's medical needs. Id. As the Ninth Circuit recently stated in Toguchi v. Chung, 391 F.3d 1051 (9th Cir. 2004), the threshold for a medical claim under the Eighth Amendment is extremely high:

> A prison official acts with "deliberate indifference . . . only if [he] knows of and disregards an excessive risk to inmate health and safety." Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1187 (9th Cir. 2002) (citation and internal quotation marks omitted). Under

> this standard, the prison official must not only "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," but that person "must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). "If a [prison official] should have been aware of the risk, but was not, then the [official] has not violated the Eighth Amendment, no matter how severe the risk." Gibson, 290 F.3d at 1188 (citation and footnote omitted). This "subjective approach" focuses only "on what a defendant's mental attitude actually was." Farmer, 511 U.S. at 839. "Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights." McGuckin, 974 F.2d at 1059 (citation omitted).

In seeking summary judgment, Vernon submits his own declaration that he followed prison procedures in giving plaintiff the medicine, which was dispensed by others and distributed to Vernon in an envelope, and he gave the medicine after plaintiff identified himself and examined the contents of the cup. Vernon declares plaintiff voluntarily swallowed the pills and Vernon believes plaintiff received the proper medication. He declares his duties do not include providing medical care or treatment and he had no control over how plaintiff was treated after the medication was ingested. He has not had any conversation or communication with Dixon regarding the allegations of the pleading and he did not conspire with Dixon to "cover up" anything. Vernon meets his burden in seeking summary judgment.

Plaintiff's statement about what Vernon intended is not competent evidence because plaintiff cannot directly know Vernon's intent except through Vernon's admissions or the circumstances. Vernon denies mal intent and the only

circumstantial evidence provided by plaintiff is of negligence, at worst.

Accordingly, the court concludes defendant Vernon is entitled to summary judgment and recommends that his March 18, 2005, motion be granted.

Pursuant to the provisions of 28 U.S.C. § 636(b)(l), these findings and recommendations are submitted to the United States District Judge assigned to this case. Written objections may be filed within 20 days of service of these findings and recommendations. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge may accept, reject, or modify these findings and recommendations in whole or in part.

Dated: June 2, 2005.

/s/ Peter A. Nowinski
PETER A. NOWINSKI
Magistrate Judge